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RICHARD J. ARSENAULT
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February 22, 1993

BY HAND

Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

Re: In the Matter of)
)
Amendment of Parts 2 and 15) ET Docket No. 93-1
to Prohibit Marketing of Radio)
Scanners Capable of Intercepting)
Cellular Telephone Conversations)

Dear Ms. Searcy:

On behalf of Tandy Corporation, we are hereby filing an original and nine copies of its Comments in the above-captioned rule making proceeding.

Please date stamp the extra copy of this filing for return to my office via messenger. Should any questions arise, please contact the undersigned at 835-8010.

Sincerely,

Richard J. Arsenault

Richard J. Arsenault

Enclosure

Q:21933-1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
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to Prohibit Marketing of Radio	)	
Scanners Capable of Intercepting	)	
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To: The Commission

COMMENTS OF TANDY CORPORATION

Tandy Corporation ("Tandy"), by its attorneys and pursuant to the Commission's Notice of Proposed Rule Making ("NPRM"),[1] hereby respectfully submits its Comments in the above-captioned proceeding.

Tandy sells an array of telecommunications, electronics, and computer products -- including radio scanners -- under its own private label as well as other manufacturers' labels. Through more than 7,000 Radio Shack, Computer City and other affiliated stores, Tandy is the world's largest retail distributor of consumer electronics products. Because Tandy distributes and sells radio scanners, and because decisions made in this proceeding will affect the marketplace for radio scanners,[2] Tandy has a significant interest in this proceeding. In these Comments, Tandy expresses its concerns regarding the

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[1] FCC 93-1, released January 13, 1993.

[2] A scanner receiver is defined in the Commission's Rules as a "receiver that automatically switches among four or more frequencies in the range of 30 to 960 Mhz and which is capable of stopping at and receiving a radio signal detected on a frequency." 47 C.F.R. § 15.3(v).

Commission's proposal for imposing sanctions on retailers of scanners which, despite having been authorized by the Commission, are subsequently found to be alterable to receive cellular telephone transmissions. NPRM at ¶ 11.

I. The Commission's Proposal

Section 403 of the Telephone Disclosure and Dispute Resolution Act (Telephone Disclosure Act), Pub. L. No. 102-556, amends Section 302 of the Communications Act of 1934 (47 U.S.C. § 302) by adding a new subsection "(d)" which mandates that the Commission promulgate regulations "denying equipment authorization . . . for any scanning receiver that is capable of--

(A) receiving transmissions in the frequencies allocated to the domestic cellular radio telecommunications service,

(B) readily being altered by the user to receive transmissions in such frequencies, or

(C) being equipped with decoders that convert digital cellular transmissions to analog voice audio."

Accordingly, the Commission issued the NPRM, "proposing to deny equipment authorization to scanning receivers that tune frequencies used by cellular telephones" (NPRM at ¶ 6) and "to require that scanning receivers be incapable of being readily altered by the user to operate within the cellular bands." NPRM at ¶ 8 (emphasis added). In accordance with the Telephone Disclosure Act, the Commission also is proposing "to deny equipment authorization to any scanning receiver that can be equipped with decoders that convert digital cellular transmissions to analog voice audio." NPRM at ¶ 9. Finally, the Commission is "proposing to deny equipment authorization to

[frequency] converters that tune, or can be readily altered by the user to tune, cellular telephone frequencies." NPRM at ¶ 10.[3]

In the NPRM, the Commission concludes by observing that "if the Commission discovers evidence that a [FCC authorized] scanning receiver, or a frequency converter used with a [FCC authorized] scanning receiver, can be readily altered to tune cellular frequencies" (NPRM at ¶ 11), it will consider imposing severe sanctions, on among others, retailers of such a scanner, even though the scanner had been granted an FCC equipment authorization.[4] Despite this admonition, the NPRM does not propose any rule explicitly imposing responsibilities on retailers of authorized scanners to ensure compliance with the new scanner authorization rule. See NPRM at App. A.

II. Imposition of Strict Liability on Retailers of Scanners Would Disrupt the Scanner Market and is Contrary to Congress' Intent

The Commission's proposal to impose severe sanctions on retailers of an FCC authorized scanner subsequently altered to receive cellular transmissions raises a number of serious concerns. As shown below, the imposition of strict liability on retailers for the actions of third parties is not only inequitable and contrary to the legislative intent underlying the

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[3] When employed with scanners capable of receiving frequencies below 800 Mhz, certain frequency converters enable reception of cellular telephone transmissions. See NPRM at ¶ 10.

[4] Sanctions could include, but are not limited to, "fines of up to $10,000 for each violation or for each day of a continuing violation up to a total of $75,000." NPRM at n.9. The Commission also could revoke the grant of equipment authorization.

Telephone Disclosure Act's scanner provision, but would disrupt the scanner market.

Unfortunately, there will always be some "creative" persons capable of devising ways to circumvent technology and designs intended by scanner manufacturers to preclude the reception of cellular frequencies. In proposing that retailers could be subjected to the imposition of severe sanctions if the Commission discovers that a third-party has altered an FCC authorized scanner to receive cellular frequencies, the Commission is, in effect, imposing a strict liability standard on the innocent retailer. It does so despite the fact that Congress only intended to ensure that manufacturers design scanners in such a way so as to preclude their products from being altered to receive cellular frequencies. See NPRM at ¶ 7.

The proposed rules "require applicants for scanning receiver equipment authorization to include in their applications a statement pledging that their receivers cannot be readily altered to receive cellular telephone transmissions." NPRM at ¶ 8. Under this proposal, scanner manufacturers are the "first line of defense" charged with ensuring that their products cannot be "readily altered" to receive cellular telephone transmissions. If they make a false certification, manufacturers -- not retailers -- should be held accountable and sanctioned if appropriate.

The Commission also has indicated that FCC "[a]pplication examiners will be advised to pay particular attention to certain types of units or features that may be indicative of the potential for such alterations . . . ."[3] Thus, the

[3] FCC News Release, Report No. DC-2300, January 6, 1993.

FCC will rely not only on a manufacturer's certification, but also its staff's examination to determine whether scanners are, in fact, readily alterable to receive cellular frequencies. Under these circumstances, it would be unconscionable to impose sanctions on retailers of scanners which have passed FCC scrutiny. Nevertheless, the Commission is suggesting that a retailer could be sanctioned if it finds that an authorized scanner sold by the retailer has been altered to receive cellular transmissions, regardless of the manufacturer's certification and the FCC staff's approval. This is not only an inequitable policy, but more importantly, it is contrary to the legislative intent underlying the Telephone Disclosure Act.

Imposing strict liability on retailers for selling authorized equipment -- subsequently altered by an inventive user to receive cellular transmissions -- is unwarranted and could adversely affect the market for scanners. It is unwarranted since the equipment will have been certified by the grantee as being incapable of being readily altered to receive cellular transmissions and because the FCC already will have examined and approved that equipment. It could adversely affect the market for scanners since most retailers -- who do not want to risk the imposition of severe sanctions for selling authorized equipment which might be altered by third parties -- will have two choices: (1) reexamine all authorized equipment (before selling it) to ensure that it is incapable of being "readily altered" to receive cellular transmissions or (2) not sell such equipment.

Most small retailers could not afford the needless expenditure of reexamining authorized equipment and probably would not sell it,

particularly if, despite their "re-examination," they still could be sanctioned if the FCC subsequently determined that the equipment did not comply. Even if larger retailers, such as Tandy, assume the expense of duplicative analysis, many might forego the marketing of scanners altogether since there will always be skilled users capable of altering scanners to receive cellular transmissions.

Surely, the Commission did not intend that its proposed rules would disrupt the market for legitimate scanner uses or result in the wasteful and redundant expenditure of considerable sums to reexamine previously authorized equipment. See NPRM at ¶ 1 ("The proposed rules are intended to increase the privacy protection of cellular users without unduly restricting legitimate uses of scanners." (emphasis added)). Not only are scanners used for amateur radio reception, including the audio portion of telecasts (particularly, sporting events), they are vital to public safety. In many rural and coastal areas, scanners are monitored by the public for emergency broadcasts: this is especially important in areas of the country prone to unpredictable and severe weather. Volunteer firemen and emergency rescue workers monitor scanners (both at home and in their vehicles) so that they can respond immediately to life-threatening emergencies. Even commuters who do not own scanners benefit from scanners since broadcasters develop their up-to-the-minute traffic reports by monitoring police, fire and emergency service activity.

Given the many important and legitimate uses of scanners, the Commission must take special care not to disrupt the market for scanner

equipment. In passing the Telephone Disclosure Act, Congress did not intend that scanners be withdrawn from the market or that the FCC adopt regulations which would discourage the legitimate use of scanners by the public. Yet the Commission's proposal to impose severe sanctions on retailers would -- at a minimum -- reduce competition at the retail level and result in higher prices for a product which is subject to significant consumer demand.

When introducing the amendment to the Telephone Disclosure Act which resulted in Section 403, Senator Pressler said:

> I expect the FCC, in adopting regulations to enforce this provision, to be conscious of the fact that some uses of scanners are perfectly legal. My intention in offering this amendment is simply to increase the privacy protections of cellular telephone users without causing harm to legitimate users of scanners.

138 CONG. REC. S17121 (daily ed. Oct. 7, 1992) (emphasis added).

Congress only intended that manufacturers -- not retailers -- would have to ensure that scanners could not be "readily altered" to receive cellular transmissions. As Senator Pressler stated:

> [M]y amendment is similar to section 9 of the FCC reauthorization bill (H.R. 1674) that passed the House of Representatives last year. . . .
>
> The purpose of this amendment is to require manufacturers of scanners to design their equipment so that the equipment does not allow users to listen to cellular calls.

Id. (emphasis added).

Not only did Congress impose no obligations on retailers of scanner equipment, but the legislative history establishes that even manufacturers of scanners were not to be held liable if the actions of third parties resulted in the altering of their scanners to receive cellular transmissions. In this regard,

the Committee Report to Section 9 of the FCC reauthorization bill (H.R. 1674) was inserted into the Congressional Record "to set forth the intent of" section 403. Id. That Committee Report provides:

> Any question of whether such a receiver complies with the regulations shall be determined by the Commission.
>
> . . .
>
> The Committee believes that as long as the equipment complies with the Commission's regulations adopted pursuant to subsection 802(d)(1) [section 403(d)(1) of the Telephone Disclosure Act], there shall be no liability under this section for manufacturers due to the actions of third parties.

Id. (emphasis added).

Given this unequivocal expression of legislative intent with respect to manufacturers' liability, the suggestion that the Commission could impose sanctions on retailers of FCC authorized scanner equipment, based on the actions of third parties, must be flatly rejected. Any other conclusion is contrary to the intent of Congress and could severely disrupt the market for scanner equipment. Instead, the Commission should make clear that retailers of authorized scanners will not be subject to sanctions due to the actions of unrelated third parties.[4]

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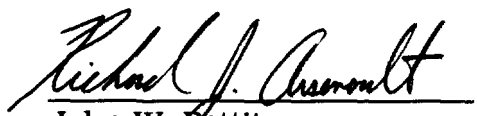
[4] The Commission should also clarify that if a frequency converter used in conjunction with a scanner enables a scanner to receive cellular transmissions, then it would be the manufacturer of the converter, not the retailer of the scanner, which could be subjected to sanctions.

CONCLUSION

For the reasons stated above, Tandy strongly urges the Commission to clarify and modify its proposed regulations as proposed in these Comments.

Respectfully submitted,



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February 22, 1993

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